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No. 00-285

Supreme Court, U.S.
FILED
NOV 1 2000
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IN THE

Supreme Court of the United States

SAM B. MCQUEEN,
Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COUNCIL),
Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

REPLY BRIEF FOR THE PETITIONER

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November 1, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

13pp

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Respondent's brief in opposition contains several points that call for a reply. None of them succeeds in casting doubt on the suitability of this case for plenary review.

I. OCRM HAS FAILED TO ELIMINATE THE CONFLICT AMONG LOWER COURTS PRESENTED BY THIS CASE

As the petition explains, "The decision below creates a deep national split of authority, which . . . involves decisions of the U.S. Courts of Appeals for the Federal Circuit, the Eighth Circuit, and the Ninth Circuit, as well as the highest courts of Colorado, Massachusetts, Ohio, and South Carolina." Pet. 10–11. Respondent South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) contends that the decision below is "not in conflict with any decision of any other court of last resort." Br. Opp. 13. This argument is without merit.

OCRM tries to explain away the conflict between the decision below and *Palm Beach Isles Assoc.* v. *United States*, 208 F.3d 1374 (Fed. Cir. 2000) by distinguishing between laws that immediately restrict property use and those that do not. Br. Opp. 14. But this distinction has no relevance. The decision below did not rest on what OCRM calls "the immediate impact of the adoption of the regulatory scheme." *Id.* Instead it rested on the lower court's determination that Mr. McQueen's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." Pet. App. 13a.

OCRM also contrasts Mr. McQueen's delay in seeking development permits with the property owner in *Palm Beach Isles*, which "commenced with its development plans immediately by obtaining Corps permits within a year of purchasing the property."

Br. Opp. 16. But Mr. McQueen's delay does not eliminate the conflict. Whether the Fifth Amendment allows OCRM to deny him compensation on the ground that he delayed seeking permits *is* the question presented. Pet. at i. The conflict involving *Palm Beach Isles* remains.

OCRM makes a feeble effort to remove the conflict with *State ex rel. Pizza* v. *Rezcallah*, 702 N.E.2d 81 (Ohio 1998) by pointing out that it "arose out of convictions for drug use." Br. Opp. 14. But this fact has no bearing on the existence of a conflict. A conflict of authority gives this Court reason to grant certiorari when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort." SUP. CT. R. 10(b). Determining whether two decisions conflict on a question arising under the Takings Clause turns not on the subject matter of the regulation, but on the impact of that regulation on the private property owner. *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 174 (1979). The conflict involving *Rezcallah* remains.

OCRM endeavors to eliminate the conflict with *Lopes* v. *City of Peabody*, 629 N.E.2d 1312 (Mass. 1994) on two grounds. OCRM notes that the *Lopes* Court addressed the owner's takings claim in the context of a challenge to the validity of a regulation, rather than as a claim for damages, and that "Lopes purchased his property six years after the adoption of the zoning regulation." Br. Opp. 14. Neither fact eliminates the conflict. The form of relief has no bearing on the question presented, which is broadly phrased in terms of "whether an owner has suffered a taking." Pet. at i. And just because Lopes acquired his land "six years *after* the adoption of the zoning regulation," *id.* (emphasis added), does not explain away a conflict arising from the Massachusetts court's

willingness to apply *Lucas* regardless of the owner's investment-backed expectations. *See* 629 N.E.2d at 1316. The conflict involving *Lopes* remains.

OCRM tries to chip away at the conflict with *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds sub nom. City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). OCRM makes the sweeping assertion that *Del Monte Dunes* "shares no common ground with *McQueen*" because, "[l]ike *Lopes*, this is a zoning case." Br. Opp. 15. As we explained earlier, the field of law from which a question arises is irrelevant when determining whether two decisions present a conflict that merit this Court's review.

OCRM next attempts to eliminate the conflict with *Del Monte* by claiming that the language cited by Petitioner is dicta. Br. Opp. 15. On this point OCRM is mistaken. The court squarely addressed "whether "[t]he jury also could have found the City liable for a taking because it denied Del Monte all economically viable use of its property." 95 F.3d at 1432. That question, in turn, formed a necessary part of reviewing the city's motion for judgment notwithstanding the verdict on Del Monte's inverse condemnation claim. *Id.* at 1430. The verdict was based on the court's instruction to decide in favor of Del Monte "if (1) all economically viable use of the property had been denied; or (2) the City's decision to reject Del Monte's development application did not substantially advance a legitimate public purpose." *Id.* at 1426. This instruction obligated the Ninth Circuit to discuss the correct legal standard under *Lucas*, which was part of the court's holding. Hence the conflict involving *Del Monte* remains.

OCRM concedes that *Good* v. *United States*, 189 F.3d 1355 (Fed Cir. 1999) bears a "meaningful resemblance" to the decision below. Br. Opp. 11. Yet it entirely ignores *Outdoor Graphics, Inc.* v. *City of Burlington*, 103 F.3d 690 (8th Cir. 1996) and *State of Colorado, Department of Health* v. *The Mill*, 887 P.2d 993 (Colo. 1994), both of which demonstrate that the decision below accords with decisions of other state courts of last resort and United States courts of appeals. These cases, when contrasted with *Palm Beach Isles*, *Rezcallah*, *Lopes*, and *Del Monte*, create "a deep national split of authority" that amply justifies this Court's review. Pet. 10.[1]

II. OCRM HAS FAILED TO ELIMINATE THE CONFLICT BETWEEN THE DECISION BELOW AND *LUCAS* v. *SOUTH CAROLINA COASTAL COUNCIL*

OCRM next asserts that "[t]he S.C. Supreme Court's decision is not inconsistent with this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)." Br. Opp. 8. A double negative cannot save this sentence from absurdity. Not only are the decisions inconsistent, they are irreconcilable.

In *Lucas* the Court explained that the Fifth Amendment obligates the government to pay compensation when a property owner can demonstrate that his is the "extraordinary circumstance when *no* productive or economically beneficial use of land is

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[1] Beyond its efforts to remove this conflict, OCRM insists that *Kudloff* v. *City of Billings*, 860 P.2d 140 (Mont. 1993); *McFillan* v. *Berkeley County Planning Comm'n*, 438 S.E.2d 801 (W. Va. 1993); and *Zealy* v. *City of Waukesha*, 548 N.W.2d 528 (Wis. 1996) do not "create[ ] a conflict that would warrant this Court's review." Br. Opp. 15. OCRM's protest is misplaced. Petitioner cited these cases not to suggest that they conflict with the decision below, but to illustrate "the confusion afflicting many lower courts over the correct interpretation and application of *Lucas*." Pet. 18.

permitted." *Lucas*, 505 U.S. at 1017. That crucial, decisive fact of regulatory confiscation is not only supported by the record in this case, it is "*uncontested*." Pet. App. 4a (emphasis added). Indeed, OCRM continues to concede that McQueen has "'suffered the loss of all economically beneficial use'" of his property. Br. Opp. 10 (quoting Pet. 19). Although OCRM labels this fact "superficial," *id.*, *Lucas* makes it clear that proof of total confiscation categorically entitles Mr. McQueen to compensation. *See Lucas*, 505 U.S. at 1016. The lower court's unwillingness to draw that conclusion establishes a conflict that OCRM cannot simply explain away. Nevertheless, it tries.

OCRM writes that "[t]he categorical rule adopted in *Lucas* does not extend to McQueen." Br. Opp. 9. To support this astonishing claim, OCRM quotes the following passage from the opinion of the Court in *Lucas*: "It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." 505 U.S. at 1027.

This quotation lends no support to OCRM's argument. Even if Mr. McQueen "necessarily expect[ed] the uses of his property to be *restricted*," *id.* (emphasis added), *Lucas* repeatedly affirms that he would not reasonably expect that all economically beneficial uses of his property would be totally *abolished*. Indeed, at the end of the paragraph from which OCRM took the sentence above, the Court underscored exactly this point:

> In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently

> eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Id. at 1028.

OCRM also tries to enlist Justice Kennedy's concurring opinion in its cause. *See* Br. Opp. 9–10. However, as an opinion concurring in the judgment, it formed no part of the opinion of the Court. *See Lucas*, 505 U.S. at 1005. It is inapposite in considering whether the decision below conflicts with *Lucas*.

OCRM then argues, "In urging this Court to grant certiorari, Petitioner focuses solely on the economic impact of the permit denial. . . . In fact, the appropriate focus is on the impact of a regulation." *Id.* at 8. Between "the economic impact of the permit denial" and "the impact of a regulation" lies a distinction without a difference. Like OCRM's other efforts at distinguishing *Lucas*, this distinction reflects an attempt to artificially narrow the holding in *Lucas* to its facts. The Court in *Lucas* mentioned that the regulation there immediately affected the property only in passing, as part of its recitation of the facts. *See Lucas*, 505 U.S. at 1009–10. The immediacy of the regulation's effect on the property appears nowhere in the Court's extensive discussion of the categorical rule affirming a property owner's right to compensation for confiscatory regulations. *See id.* at 1015–16, 1019, 1027–28, 1031–32.

OCRM also charges that the decision below differs from *Lucas* because "Lucas had no notice, or reason to know, in 1986, that the S.C. Legislature would eliminate all value and use of these lots a mere two years after his purchase." Br. Opp. 7. But the question of notice did not figure in the Court's holding in *Lucas*. *See* 505 U.S. at 1031–32.

More importantly, Lucas's lack of notice in 1986 closely resembles Mr. McQueen's lack of notice in 1961. Neither owner knew when he purchased his property that the State of South Carolina would later regulate it to the point of confiscation. For all these reasons, the conflict between the decision below and this Court's decision in *Lucas* remains.

III. OCRM'S OTHER CONTENTIONS ARE EQUALLY UNAVAILING

OCRM suggests that Mr. McQueen's constitutional right to compensation has eroded with his land. That is the import of OCRM's statement that "McQueen, like Good, delayed development during a time when 'public concern about the environment resulted in numerous laws and regulations affecting land development.'" Br. Opp. 13 (quoting *Good* v. *United States*, 189 F.3d 1355, 1362 (Fed. Cir. 1999). Not only does this statement beg the question presented, namely whether a delay in developing real property excuses a government agency from paying the owner compensation when a regulation is totally confiscatory. Pet. at i. It ignores the practical difficulties[2] and unfairness of denying compensation based on a land use practice (developing real property after lengthy delays) both widespread and supported by settled principles of law. *See* Br. Amicus Curiae Nat'l Assoc. Home Builders & Cal. Bldg. Indus. Assoc. at 6–10 (Oct. 20, 2000).

OCRM adds insult to injury by maintaining that Mr. McQueen has only himself to blame for his loss. That is the evident meaning behind OCRM's contention that his property became subject to the Coastal Zone Management Act (Act), S.C. Code Ann.

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[2] Such practical difficulties may be financial, *see, e.g.*, R. 206, or medical, as in the case when a property owner is physically or mentally unable to pursue development plans.

§§ 48-39-10–220 (1993), and therefore legitimately within OCRM's statutory jurisdiction, only because Mr. McQueen stood by while erosion transformed it into a protected wetland. Br. Opp. 2, 3, 10, 11. This argument is both incorrect and beside the point.

Incorrect because the Act expressly prohibits an owner to "erect any structure on or in any way alter any critical area without first obtaining a permit . . . ." S.C. Code Ann. § 48-39-130(C). Even though "[t]he construction of a bulkhead is an allowable activity," Br. Opp. 3, it is one requiring the owner to obtain a permit. OCRM admits as much when it acknowledges that "in the early 1980's McQueen became aware of the need for a permit to erect a bulkhead." *Id.* Passage of the Act, not erosion, imposed on Mr. McQueen the legal obligation to obtain a permit before developing his property.

Moreover, OCRM's argument, even if true, has no bearing on the merits of the petition. The decision below did not rest on whether he could demonstrate "the immediate impact of the adoption of the regulatory scheme." *Id.* Instead that decision held that Mr. McQueen's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." Pet. App. 13a. OCRM's contention that the 1977 Act did not immediately restrict Mr. McQueen's is therefore not pertinent to deciding whether certiorari is merited.

OCRM also charges that Mr. McQueen "waited until it was too late to preserve his property." Br. Opp. 5 n.6. This is contradicted by OCRM's statement that "[i]n 1991, when McQueen finally decided to develop these lots, the lots could no longer support residential construction without the addition of

truckloads of fill material." Br. Opp. 4. If his property remained capable of "support[ing] residential construction" with the addition of backfill, *id.*, then it was not "too late to preserve." *Id.* at 5 n.6.

Finally, OCRM asserts that Mr. McQueen's takings claim is defeated, because he bought his property subject to The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994). *See* Br. Opp. 13. However, this act does not furnish "background principles of nuisance and property law that prohibit," *Lucas*, 505 U.S. at 1031, Mr. McQueen from putting up bulkheads and adding backfill to his property. As an initial matter, OCRM has not preserved the issue. Its only attempt to mount a defense on the ground of "background principles" met with a firm rebuff by the court below when it held that *Carter* v. *South Carolina Coastal Council*, 314 S.E.2d 327 (1984) was overruled by *Lucas*. Pet. App. 9a.

Besides, OCRM's own statements contradict the notion that its permit denials were defensible as a matter of generally-applicable nuisance or property law. OCRM states that "surrounding, similarly situated property owners began installing bulkheads to prevent erosion as early as 1968." *Id.* at 2–3. Even after South Carolina set out to protect tidal wetlands, "[h]undreds of other lots in this area, created from the same dredge and fill operation, were developed, and hundreds of other similarly situated property owners realized their investment expectations, in spite of the adoption of the regulatory scheme." *Id.* at 9. Given this record, OCRM has no basis to argue that background principles of law obliged it to prevent Mr. McQueen from developing his property. "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . ." *Lucas*, 505 U.S. at 1031.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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